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# Supporting Children, Balancing Lives

Katharine K. Baker\*

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## I. INTRODUCTION

Most children in this country are provided for, in whole or in part, pursuant to one of three support mechanisms. The first, direct payments from the state to a parent, is commonly called welfare. The second, court-ordered payments from one parent to another, is commonly called child support. The third, intrahousehold transfers between married persons whereby the person who earns a majority of the household's money authorizes others within the household to spend it on behalf of the child, is commonly called normal. In this article I will argue that by modeling itself on the intrahousehold transfer normative ideal (the third system), our child support doctrine (the second system) sanctions a gendered division of labor that makes it very difficult for any one parent to balance the demands of the market with the demands of home life. I will go on to suggest that child support based more on the first system, support payments directly from the state to parents, would help break down the gendered division of labor and thereby make it easier for all parents to balance market and home work.

The normative ideal embodied in a married, heterosexual, two parent household in which adults negotiate different parenting roles deeply informs, if not determines, what our welfare policies,<sup>1</sup> child support formulas,<sup>2</sup> tax

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1. The modern notion of welfare originated in Illinois in 1911 with "mother's pension," which was provided to needy fatherless children so that their mothers did not need to work outside the home. Const. Rights Found., *How Welfare Began in the United States* ¶ 11 (1998), <http://www.crf->

policies,<sup>3</sup> and spousal support doctrines<sup>4</sup> look like, but it is not actually normal. A clear majority of children born today in the United States spend at least some of their childhood apart from one of their parents, and many children never experience a traditional nuclear family.<sup>5</sup> Yet the married, two-parent family remains the idealized and most widely used model. This allegiance to the nuclear family model is partly historical: for a while in our history it was normal for children to be raised and solely supported within the confines of a two parent heterosexual household.<sup>6</sup> The allegiance to the

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usa.org/bria/bria14\_3.html#welfare. All but two states had a mother's or widow's pension program by 1933. *Id.* at ¶ 12. The mother's pensions were the nation's first publicly funded social benefits. CHARLES NOBLE, *WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE* 51 (1997). In 1935, the Aid to Families with Dependent Children (AFDC) was created to provide welfare to poor children who were deprived of one of their parent's support because of absence, incapacitation, unemployment, or death; children with married parents unusually did not qualify for this aid. U.S. Dep't. of Health & Human Servs. Office of the Assistant Sec'y. for Planning & Evaluation, *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF)* (2004), <http://aspe.hhs.gov/HSP/abbrev/afdc-tanf.htm>.

2. See *infra* Part II.

3. The most obvious way in which our tax structure incorporates the normative ideal is by maintaining "equality" between the way that dual income couples are taxed and single-income couples are taxed. See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1606-10 (1996). What this means is the earnings of a lesser earner in a dual income couple are "stacked" on top of the wages of the greater earner, thus subjecting all of the lesser earner's income to the highest marginal rate of the greater earner. *Id.* at 1609. This system leaves the one earner household better off than the dual-earner household because the single-earner household needs to buy fewer domestic services than does the dual-earner household (particularly if there are children in the household) and the labor performed in the home by the non-earning spouse is not taxed. For more on tax policy and its effects on women generally, see EDWARD MCCAFFERY, *TAXING WOMEN* (1997) (arguing that many tax policies promote a gendered division of labor).

4. Spousal support, or alimony, guidelines usually suggest that a spouse who invested in the family instead of in outside employment should be rewarded with more spousal support than a spouse who invested in market work as well as family. See, e.g., IND. CODE ANN. §31-15-7-2 (2005) (compensating for interruptions in employment "as a result of homemaking or child care responsibilities"); 23 PA. CONS. STAT. § 3701 (2006) ("contribution of a spouse as a homemaker"); AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* §5.05 (2002) [hereinafter *PRINCIPLES*] (giving compensation for disproportionate share during the marriage of the care of marital children).

5. SARA MCLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS* 2-3 (1994) ("Well over half of the children born in 1992 will spend all or some of their childhood apart from one of their parents"). McLanahan and Sandefur's data are based on the 1990s data, but there is no reason to think that any relevant demographics have changed significantly enough to affect the finding that a majority of children grow up outside the confines of the nuclear family ideal.

6. There is still some debate about when the two-parent heterosexual household became the norm. Evidence suggests that the nuclear family's emergence pre-dates the industrial revolution. See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 54-62 (2000). However, prior to industrialization, the household was much more embedded in kinship ties and feudal relationships, which provided sources of support and obligation. The isolated nuclear family as we tend to idealize it today probably did not emerge until the late 18<sup>th</sup> century in northwestern Europe, and it emerged later, if at all, in many other cultures. LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* 655-56 (1979). Even then, many, if not most of these households also included adults other than the mother and father, grandparents, aunts and uncles and others. See Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 270-72 (1995)

nuclear model may also be theoretical. Economist Gary Becker won the Nobel Prize arguing that households, as households (not as a mere collection of individuals), were economic units.<sup>7</sup> Members of a household organize themselves as a unit in order to facilitate divisions of labor within the household.<sup>8</sup> That specialized division of labor, argued Becker, makes households efficient.

In contemporary households, parents that specialize the most can do so in reliance on a family law system that enforces what Becker understood as the specialization contract. In other words, the agreement that many parents reach, “X” will provide parenting and domestic services in return for “Y”’s money, is enforced at divorce. X specializes in hands-on parenting, safe in the knowledge that at divorce her children will be provided for by Y, and Y specializes completely in market work, safe in the knowledge that at divorce he will still be entitled to a relationship with his children. Each specializing parent is entitled to a share of what the other parent specialized in, either money or time with children.<sup>9</sup>

These specialization agreements within households may well, as Becker theorized, make households efficient, but they also make balance difficult. The more one specializes in one role, the harder it is to fill a variety of roles. Organizational structures that encourage specialization hinder balance. By relying on the household as the basic unit of measurement for child support purposes, child support doctrine validates and enforces the specialization contracts that arise within households. What a child is entitled to at divorce is a function of household arrangements that his or her parents agreed to while working as a unit. The more efficient a child’s parents’ “firm,” the more the child is entitled to. As Becker recognized, efficiency in these firms usually correlates not only with specialization, but with gendered specialization.<sup>10</sup> By making the child’s entitlement a function of the economic efficiency of the household, child support doctrine validates traditional divisions of labor within households.<sup>11</sup>

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(African-American families have never relied as extensively on the traditional nuclear family to raise children as has white America).

7. Traditional economic theory ignored intrahousehold behavior, presuming that each household had only one member. GARY S. BECKER, *A TREATISE ON THE FAMILY* 20 (1991).

8. *Id.* at 30-37.

9. *See generally id.*

10. Becker argued that a *gendered* division of labor was not inevitable, but “[s]pecialization in the allocation of time and in the accumulation of human capital would be extensive in an efficient family even if all members were biologically identical.” *Id.* at 30.

11. It is worth noting at the outset that working for more balance necessarily means disrupting gender norms. Gender operates to polarize the masculine and feminine, male and female. *See* SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL*

This article proceeds in three parts. Part II explains how child support formulas currently work, and why, given how inexact and inapposite they usually are, we should be eager to generate alternative models. Part III examines contemporary household arrangements. It shows where and why specialization is still the norm. In these households, it is usually mothers who caretake in return for a share of the fathers' income, while fathers pay for the right to be fathers. Part III also suggests that there are reasons to be troubled by this traditional division of labor, not the least of which is its tendency to produce very unbalanced lives. Part IV therefore suggests that the law adopt a new approach to the enforcement of traditional divisions of labor. It argues that by establishing a default rule of non-specialized parenting so that each parent is presumed to be responsible for both caretaking and providing, the law could destabilize household specialization contracts. The less stable those contracts, the more balance we are likely to achieve.<sup>12</sup>

## II. CHILD SUPPORT

In 1984 the United States Congress mandated that states develop guidelines that would help ensure that child support awards were determined in a reliable and systematic matter.<sup>13</sup> The federal regulations, in place since 1989, require states to promulgate numeric guidelines that take into account "all earnings and income of the non-custodial parent" and "economic data on the cost of raising children."<sup>14</sup> Already one can see some tension in these requirements. An award based on "income of the non-custodial parent" is not necessarily based on the cost of raising a child; it is based on what the parent can provide. In fact, despite the federal guidelines, there are no

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INEQUALITY 80-82 (1993). One cannot be both masculine and feminine at the same time, but that is exactly what those who want balance strive for.

12. The idea of treating the child support obligation as a contract is both standard and radical. As discussed, Becker's theory of household specialization implicitly assumed the parties could rely on their agreement (or contract) to divide labor, even though family law doctrine has traditionally rejected contract as a paradigm for familial obligation. See Ira Mark Ellman, "Contract Thinking" Was Marvin's *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1373-78 (2001) (arguing that contract paradigms do not correspond to people's intuitions or expectations regarding family relationships). Courts may be particularly wary of deferring to private arrangements regarding child support because the state has a *parens patriae* interest in protecting the child. Nonetheless, in practice, "parents actually have broad powers to make their own deals. Typically, separation agreements are rubber stamped even in cases involving children." Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 (1979). Admittedly, the contracts proposed here are made before, not during the course of, divorce, which might make courts more wary, but all contracts involving the division of labor are made prior to the labor actually being performed. Moreover, courts now routinely accept the legitimacy of post-nuptial agreements. See Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 505 (2005).

13. 42 U.S.C. §§ 666-667 (2000).

14. 45 C.F.R. § 302.56(c)(1), (h) (2005).

economic data on the *cost* of raising a child. For some experts, the failure to generate cost formulas and data is not problematic because thinking in terms of costs may be inappropriate. Different parents spend different amounts of money on their children and expenditures on children inevitably vary with income levels in a household.<sup>15</sup> Therefore, the argument goes, we should look to expenditures on children, not costs.

A benefit of looking to expenditures is that we do have data on household expenditures.<sup>16</sup> It is from household expenditure data that economists try to ascertain how much spending levels within households vary with the presence of children.<sup>17</sup> What these formulas capture—or try to capture—is the marginal cost of providing for a child at any given income level.<sup>18</sup> The child support formulas then use this marginal cost data to help ensure that a custodial household receives the marginal amount necessary to keep the child at the standard of living that he or she would have enjoyed if his parents lived together.<sup>19</sup> Most states use one of two formulas to make their calculations. Under the “income shares” formula, states determine the child support obligation for a given number of children at the combined income level of the parents and then divide that obligation between the parents in proportion to the amount of income that each parent contributes to the combined income level (so equal earners would each pay 50% of the support obligation, and a sole earner parent would pay 100% of the child support obligation).<sup>20</sup> Under a “percentage of obligor income” formula, a certain percentage of the obligor’s income is pledged to child support, based on the number of children involved (20% for one child, 25% for two children, etc.).<sup>21</sup>

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15. “[A]sking about the cost of raising a child is unsatisfactory . . . . [I]t invites answers that focus on some minimum level of subsistence . . . [and it] . . . implies a single answer when in fact a range of answers is possible.” THOMAS J. ESPENSHADE, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES* 1-2 (Urb. Inst. 1984).

16. These data are limited to spending by households as a whole. There are no data on what individual members within a household spend. Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167, 182, 184-85.

17. There are two primary methodologies. One methodology looks at what percentage of a childless household’s budget goes to food at a given income level and then determines at what income level a household with a child spends that same percentage on food. The other methodology makes a comparable determination with regard to adult clothing. Both of these methodologies try to capture the marginal cost to a household of adding a child. See Julie Nelson, *Household Equivalence Scales: Theory versus Policy?* 11 J. LAB. ECON. 471 (1993).

18. For an excellent and detailed account of this whole process see generally Ellman, *supra* note 16.

19. *Id.* at 179.

20. *Id.* at 180-81.

21. *Id.* The “obligor” is the parent responsible for paying child support.

There are a number of practical and theoretical problems with using these formulas, all stemming from trying to capture the marginal expenditure that households spend on children. The first practical problem goes to the relevance of *marginality*. The second practical problem goes to the data on joint *expenditures*. The theoretical problems go to the idealization of *households*.

First, even if we could determine the marginal cost of raising a(nother) child in a two-adult household that already exists, that marginal figure tells us very little about how much it costs to raise a child in a single parent household.<sup>22</sup> A couple or family considering whether to welcome a new child into their household might be interested in knowing how much *more* they will have to spend in order to keep the same standard of living once that child arrives, but the marginal measure does not capture what it costs to raise a child in a household that is not or never was “intact.”<sup>23</sup> As anyone who has ever had a roommate knows, there are economies of scale to living together. Using the marginal measure, and only the marginal measure, assumes that those economies still exist. That is simply false. To use just one example, if an “intact” two-adult household has one car and the car is used daily to bring a child to daycare, the child’s marginal transportation costs are limited to the gas and wear attributable to driving to daycare. If the household splits up, however, and the car and the child do not go together, the analysis upon which child support awards are based ignores the fact that the custodial household now needs a car. The cost of the child to the custodial household must include the cost of transporting the child to daycare.

The second practical problem with the marginal expenditure measures is that the data ignore joint expenditures.<sup>24</sup> Assume the day care center is in one adult’s workplace. In that case, the child’s marginal transportation costs are actually zero. The household spends nothing more in transportation once the child arrives. But that hardly means the child has no transportation costs. She needs to get to daycare. Or, consider whether it costs anything to keep a child warm in the winter. Few households increase their heating bill when a child arrives. The marginal cost of heat for the child is zero. By using a marginal measure, the figures assume that the custodial household is not entitled to any financial help for those costs which adults share with children. As Ira Ellman points out, “there is no inherent theoretical or principled basis upon which to allocate joint consumption items among household members.”<sup>25</sup>

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22. *Id.* at 187.

23. *See id.* In this context, “intact” means a household shared by both parents.

24. *Id.* at 193-94.

25. *Id.* at 194.

Despite these significant practical limitations, an allegiance to the household expenditure model might make sense if we were confident in the belief that child support awards *should* be based on a continuity of *household* expenditure principle (however impossible that is to actually ascertain). But it is not at all clear that we should be so confident. There are numerous theoretical problems with the attempt to replicate household expenditures. First, more than 30 % of the children in this country are born to women who are not married.<sup>26</sup> Of those children, only 50% have parents who share a household at birth, and only 40% have parents who share a household by the child's third birthday.<sup>27</sup> Many unwed parents never intended to share parenthood at all.<sup>28</sup> Why do we assume that the child is entitled to the expenditure level of a household that never existed, or existed only briefly?

Children of parents who divorced or separated after a period of cohabitation also often end up in some form of alternative household. Fifteen percent of children live in a blended family.<sup>29</sup> Twenty percent of children who live in mother-only households also live with an adult male.<sup>30</sup> Forty percent of children who live in father-only households also live with an adult female.<sup>31</sup> These children are presumably being raised in households that, like most households, share expenses and space, jointly consume many items, and treat each member as equally entitled to resources. Yet the child support figure to which the child is entitled is based on the standard of living in a previous (or never existent) household comprised of the child's two legal parents. The child's real life household has remarkably little bearing on her entitlement.<sup>32</sup>

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26. Brady E. Hamilton et al., Nat'l Ctr. for Health Statistics, *Final Births for 2004*, <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/finalbirths04/finalbirths04.htm>.

27. Marchia Carlson, Sara McLanahan & Jeanne Brooks-Gunn, *Unmarried but Not Absent: Fathers' Involvement With Children After a Nonmarital Birth* (Center for Research on Child Well-being Working Paper #05-07-FF), available at <http://crcw.princeton.edu/workingpapers/WP00-07-McLanahan.pdf>.

28. In their study of child support, Andrea Beller and Joan Graham found that only 16% of never-married mothers received a child support award and almost half of the group that did not receive an award said that they did not want one. ANDREA BELLER & JOHN GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* 88 tbl.4.2, 20 tbl.2.1 (1993).

29. NANCY DOWD, *REDEFINING FATHERHOOD* 27 (2000).

30. *Id.* at 28.

31. *Id.*

32. Many state formulas do give judges some discretion to take into account other resources available to the child or the custodial parent, but subsequent household income or standard of living is not incorporated into the formulas in any systematic way. *See, e.g.*, 750 ILL. COMP. STAT. 5/505(2)(a)-(b) (2006) (allowing courts to take into consideration the resources available to the child and the custodial spouse).



Second, why do we assume that children of rich parents should be entitled to more, in child support, than children of poor parents? For sure, as Martha Minow writes, there is “a remarkable degree of consensus . . . [that] . . . [p]eople who produce children should provide for their support.”<sup>33</sup> But that consensus does not necessarily specify the extent to which parents should support children.<sup>34</sup> The reason children need financial resources is because, as children, they are inherently dependent. Children of rich parents are no more dependent than children of poor parents. The child support guidelines are designed to minimize the financial hardship that children of non-intact households suffer because their household is not intact. That measurement assumes that we should minimize the difference between the children of separated parents and the children of parents who are still married. But the majority of children in this country do not spend their childhood in an intact married household. Why should we use a non-majoritarian norm as the basis of entitlement? Why not try to minimize the differences between all children who rely on state mechanisms (court-ordered child support and welfare programs) to receive financial support? One could easily argue that, given the extraordinary non-financial advantages that children of well-educated, safe and stable (even if divorced) parents enjoy,<sup>35</sup> it is the children at the low end of the economic spectrum who most need the state’s help. If we taxed all those who procreated at a flat rate, but distributed the proceeds of that tax evenly across the class of children entitled to child support, we could effectuate such a result.<sup>36</sup> In

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33. Martha Minow, *How Should We Think about Child Support Obligations*, in *FATHERS UNDER FIRE 302* (Garfinkel, McLanahan, Meyer and Seltzer eds., 2001).

34. Before the federal guidelines were passed, states had wildly disparate standards and policies for child support. See Nancy Thoennes et al., *The Impact of Child-Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 *FAM. L.Q.* 325, 326 (1991) (citing studies).

35. Annette Lareau argues that the advantage that middle and upper middle-class children enjoy over working class and poor children is mostly attributable to different parenting patterns, not money. See ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE 5-6* (2003). Middle class parents are much more likely to cultivate their children’s intellectual and emotional development by challenging and empowering them, thus making those children better able to navigate and manipulate the institutions and power structures that they will encounter as young adults. *Id.* For previous work on the non-monetary advantages of class, see CHRISTOPHER JENCKS ET AL., *WHO GETS AHEAD? THE DETERMINANTS OF ECONOMIC SUCCESS IN AMERICA* (1979).

36. Admittedly, even if one is attracted to this idea as a policy matter, it would be a hard political sell. Presumably, most people would be unwilling to give money to support someone else’s child—unless, perhaps, the individual liability under a “procreation tax” system amounted to less than what some wealthy parents are now responsible for paying. If a lesser procreation tax could be sold politically because it would render smaller liabilities, that is, if people are willing to pay for someone else’s children as long as they get to pay less for their own, then there is no reason to automatically link the individual parent’s obligation to the individual child’s entitlement. Most industrialized countries impose some child support liability on unwed and divorced parents, but the liability imposed is only a fraction of what the child or her caretaker ends up receiving from the government. See Alfred J. Kahn & Sheila Kamerman, *Introductory Note: Child Support in Europe and Israel in*

such a system the child's non-existent household would not serve as the source of her entitlement, her status as child would.

Third, focusing on what households spend on children instead of on what children cost allows the state, for the most part, to ignore the question of how much children need. Defenders of the system argue that asking the cost question leads to "answers that focus on some minimum level [of] biological subsistence,"<sup>37</sup> but by refusing to ask the cost question, we legitimize a system that refuses to focus on a meaningful minimum level of subsistence. Approximately 3.6 million children in this country receive state-sponsored subsistence payments,<sup>38</sup> but 13.5 million children live below the poverty level and 29.2 million children live below the level that research suggests families must have in order to meet basic needs ("low-income children").<sup>39</sup> The United States has the highest child poverty rate in the industrialized world.<sup>40</sup> There is a direct relationship between the amount of money countries spend on children and child poverty.<sup>41</sup>

By envisioning the child primarily as a part of a household and not as an individual, our child support system helps hide these alarming statistics. The state eschews responsibility for poor children because it is the household that is supposed to meet the child's basic needs. Unfortunately, many households cannot. Just under half (49%) of low-income children live with married parents.<sup>42</sup> Over half (55%) of low-income children have at least one parent who works full-time, year-round.<sup>43</sup> Poor households (even intact, working, poor households) simply do not have enough to pay the cost of raising a child, but because our child support policy never asks the question with regard to cost, that critical fact gets hidden.

The above discussion belies the supposition that child poverty is the result of decaying family structures and irresponsible child birth. Children living with both of their biological parents in a traditional nuclear family

CHILD SUPPORT 45-49 (Alfred J. Kahn & Sheila Kamerman eds., 1988).

37. ESPENSHADE, *supra* note 15, at 1-2.

38. NAT'L CTR. FOR CHILDREN IN POVERTY, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (hereinafter TANF) CASH ASSISTANCE, [http://www.nccp.org/policy\\_detail\\_12.html](http://www.nccp.org/policy_detail_12.html) (Jan. 2006).

39. NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: BIRTH TO AGE 18, [http://www.nccp.org/pub\\_lic06.html](http://www.nccp.org/pub_lic06.html) (Jan. 2006).

40. CHILD WELL-BEING, CHILD POVERTY AND CHILD POLICY IN MODERN NATIONS: WHAT DO WE KNOW? (Koen Vleminckx & Timothy M. Smeeding eds., 2003).

41. See LAWRENCE MISHEL, ET AL., ECON. POLICY INST., THE STATE OF WORKING AMERICA 2004/2005 412 fig.7-J (2005). The United States spends approximately 4% of its GDP on children and has a child poverty rate of approximately 22%. *Id.* This is a lower GDP percentage and a significantly higher poverty rate than the next closest country, Italy, which spends close to 6% of its GDP on children and has a child poverty rate of 16%. *See id.*

42. TANF, *supra* note 38.

43. *Id.*

may be less likely to live in poverty than children living in single parent households,<sup>44</sup> but keeping parents together and relying on voluntary intrahousehold transfers of resources does not ensure that children's basic needs are met. Making sure that one parent is working does not ensure that children's basic needs are met either.<sup>45</sup> The welfare reform movement of a decade ago was fueled by the belief that getting parents to work would allow them to break free from reliance on the state, and, presumably, break out of poverty.<sup>46</sup> The movement from AFDC to Temporary Assistance to Needy Families (TANF) did render substantial changes in the work patterns of poor single parents, but the recent statistics make clear that it did not lift children out of poverty.<sup>47</sup> The plain fact is that many households cannot meet children's needs. Why, then, should our child support policies focus on the household and not the child?

Fourth, the emphasis on the importance of paid work in our welfare policy is inconsistent with the child support system's embrace of a household model. As Gary Becker suggested, if the household is the proper unit of measurement, it is the proper unit of measurement because of the specialization that happens within it.<sup>48</sup> Parents (overwhelmingly married mothers) who stop working or significantly decrease the number of hours they work in order to specialize in child care do so in reliance on someone else doing market work in order to support the child.<sup>49</sup> Women who do this are not told how irresponsible they are for having children that they cannot support without aid. They are not told that they are lazy because they cannot find a job. Most of these women actually walk away from jobs that pay significant amounts of money.<sup>50</sup> They are usually not shunned for doing so; indeed, the opposite is often true.<sup>51</sup> They are seen as selfless because they

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44. See IRWIN GARFINKEL & SARA S. MCLANAHAN, *SINGLE MOTHERS & THEIR CHILDREN: A NEW AMERICAN DILEMMA* 14 fig.1 (1986). Approximately 50% of children in mother-only families live below the poverty line, compared to 13% in dual parent families. See *id.*

45. See *supra* note 43 and accompanying text.

46. See NOBLE, *supra* note 1, at 127-28.

47. U.S. DEP'T. OF HEALTH & HUMAN SERVS., 2002 TANF ANNUAL REPORT TO CONGRESS 176, <http://www.acf.hhs.gov/programs/ofa/annualreport5/chap09.pdf> (June 29, 2006) ("States have made remarkable progress since the enactment of the TANF program in moving families into work.").

48. See *supra* notes 7-8 and accompanying text.

49. See discussion *infra* Part III.

50. See *infra* text accompanying notes 84-87 (noting that women with professional degrees and women from high income households are the most likely to leave labor force).

51. While stay-at-home mothers sometimes feel attacked by feminists, see JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 145-50 (2000), they are often lionized by politicians. See EDWARD J. MCAFFERY, *TAXING WOMEN* 207-10 (1997). To see how conflicted our political rhetoric is regarding the proper role of mothers, one need only see how the architects of the Contract with America cheered stay-at-home spouses married to wage earners, yet vilified welfare recipients. Compare *id.* at 208 (the Contract with America "identifies two-worker families, by which it obviously means . . . working wives, as the problem" with America) with *Republican Contract With America* ¶ 9, <http://www.house.gov/house/Contract/CONTRACT.html> (discussing how a two-years-and-out welfare reform requiring welfare recipient

choose to forego money in order to invest emotionally in their children.<sup>52</sup> The women most likely to make this life choice are married to the husbands who make the most money.<sup>53</sup> This means that the richest children are the ones most likely to have a parent who chose to earn absolutely nothing.<sup>54</sup> Note the contrast: our welfare norms suggest that working is the most responsible way of taking care of children, but our child support system suggests that there is nothing wrong with investing in caretaking work and relying on others to provide financially.

Given this litany of problems, it is odd that the household continues to be lionized as the ideal unit of measurement. From an economic modeling perspective, it focuses the analysis on a unit that no longer exists (and may never have existed) for the individuals involved. Moreover, the data we have on households do not help us determine what share of household expenditures children actually consume, nor do they help us compensate for the economies of scale that are lost when a household splits up. The data also ignore the fact that goods that a child shares with a custodial parent are still goods that a child needs. From children's perspective, the household is a problematic unit of measurement because it assumes that children are entitled only to what their legal household can provide, not what they need. In doing so, it perpetuates massive inequalities in what children receive in support. From a welfare policy perspective, using the household as a unit of measurement allows richer women to specialize in caretaking even as we forbid poorer women from doing so. The extent to which responsible parenthood is defined as both caretaking and providing now depends on one's economic class. The next section analyzes more closely those households that divide the jobs of caretaking and providing.

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mothers to work will promote individual responsibility).

52. See MCAFFERY, *supra* note 51, at 207-10.

53. Harold Benenson, *Women's Occupational and Family Achievement in the US Class System: A Critique of the Dual Career Family Analysis*, 35 BRIT. J. SOC. 19, 28 (1984) (wives of high-income husbands half as likely to work outside the home as wives of median-income men). This study is old, but more recent work shows comparable results. Mary Blair-Loy and Amy Wharton's survey of the top 15% of managers of one financial services firm found that they all worked very long hours, had high incomes and had stay-at-home spouses. MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES 193-94* (2003) (citing Mary Blair-Loy & Amy Wharton, *Globalization, Commitment and Constraints: Corporate Flexibility Policies among Managerial and Professional Workers* (unpublished manuscript, on file with author)).

54. A while ago, never-married mothers were the mothers that were most likely not to work in the market at all. Jane Waldfogel, *The Effect of Children on Women's Wages*, 92 AM. SOC. REV. 209, 211 (1997). However, the trends of the last decade indicate that many more never-married mothers are working, and more well-educated mothers are not. *Compare* discussion *infra* notes 84-87 and accompanying text *with* discussion *supra* notes 46-47 and accompanying text.

### III. SPECIALIZED HOUSEHOLDS TODAY

Approximately 70% of mothers with children under age 18 work outside the home.<sup>55</sup> Approximately 65% percent of married mothers work outside the home.<sup>56</sup> In other words, most married households do not specialize to the extent of having only one master of paid work. Most households do assign an individual to specialize in domestic work, however, and that individual is almost always female. Marriage increases the amount of domestic work that women perform, but it decreases the amount of domestic work that men perform.<sup>57</sup> Most married women, regardless of whether or not they work outside the home, do vastly more housework than their husbands.<sup>58</sup> Women employed full-time spend 20-30 hours per week on housework, while their spouses spend half, or less than that.<sup>59</sup> Women employed less than full-time do an even greater percentage of housework. Studies suggest that the more money wives make, the less housework they do,<sup>60</sup> but the same is not true for men.<sup>61</sup> Men do not do very much work inside the home, and they do not do more or less of it just because they are earning more or less money outside the home.<sup>62</sup> It appears, then, that as wives earn more money, they purchase domestic services from third parties.

Relative earnings appear to be a stronger predictor of the amount of domestic work that men perform. Four studies suggest that as women earn

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55. U.S. DEP'T. OF LAB., BUREAU OF LAB. STATISTICS, NEWS, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2005, tbl.4 (April 27, 2006), <http://www.bls.gov/news.release/pdf/famece.pdf> (last visited Oct. 18, 2006).

56. *Id.*

57. Beth Anne Shelton & John Daphne, *Does Marital Status Make a Difference?* 14 J. FAM. ISSUES 401 (1993) (women's domestic labor goes up with marriage); Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700, 700-01 (1999) (men's domestic labor goes down with marriage).

58. David Demo & Alan Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?* 42 FAM. REL. 323, 323-31 (1993); BETH ANNE SHELTON, WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE 65-66, 73, 79 (1992); ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 271-78 (1989) (estimating that women who work outside the home work approximately one full month a year more than their co-earning spouse).

59. Martha Hill, *Patterns of Time Use, in TIME, GOODS, AND WELL BEING* 133, 148 (F. Thomas Juster & Frank P. Stafford eds., 1991). See generally F. Thomas Juster & Frank P. Stafford, *The Allocation of Time: Empirical Findings, Behavioral Models, and Problems of Measurement*, 29 J. ECON. LITERATURE 471-522 (1991) (compiling and comparing data on time use by men and women in different countries).

60. See Scott Coltrane, *Research on Household Labor, Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208, 1226 (2000).

61. Joni Hersch & Leslie S. Stratton, *Housework, Fixed Effects, and Wages of Married Workers*, 32 J. HUM. RESOURCES 285, 286, 301 (1997). Husbands spend more time on domestic work when their wives work full-time, but not much more when they work part-time. See Yoshinori Kamo, *Determinants of Household Division of Labor: Resources, Power and Ideology*, 9 J. FAM. ISSUES 177, 195 (1988). This is important because many of the statistics on women in the labor force include part-time workers. See U.S. DEP'T. OF LAB., *supra* note 55, at tbl.1.

62. Hersch & Stratton, *supra* note 61, at 301.

more money relative to their husbands (at least in the range between earning nothing and earning half the family income), they do less housework, and their husbands do more.<sup>63</sup> Thus, the more women earn relative to their husbands, the more equal the division of labor within the home (though in the most equal households, women still perform 59% of the domestic work).<sup>64</sup> In other words, whether looking at women's absolute earnings or their relative earnings, the more women earn, the less the couple itself specializes.

Two sometimes overlapping theories can explain women's specialization. The first theory suggests that because domestic work is low status work, one's ability to avoid it depends on the relative resources one brings to the household. Thus, the greater share of income that one contributes, the less domestic work one performs. The studies cited above, showing that women's share of domestic work decreases as their relative earnings goes up, support this theory.<sup>65</sup> Most wives earn less than their husbands; therefore women do more of the domestic work.<sup>66</sup> A notable problem with this theory, however, is that in those couples where the wife actually earns more than her husband, the wives again begin to do a greater share of the housework.<sup>67</sup> There is a curvilinear relationship with women's share of housework going down as their earnings (relative to their husbands') goes up, but at equal earnings, the curve inverts and begins to go up again.<sup>68</sup> Further research suggests that this curvilinearity, at least in the United States, comes almost exclusively from those households in which

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63. Catherine Ross, *The Division of Labor at Home*, 65 SOC. FORCES 816, 816, 818 (1987); Julie Brines, *Economic Dependency, Gender and the Division of Labor at Home*, 100 AM. J. SOC. 652, 652 (1994); Harriet B. Presser, *Employment Schedules Among Dual-Earner Spouses and the Division of Labor by Gender*, 59 AM. SOC. REV. 348 (1994); Theodore N. Greenstein, *Economic Dependence, Gender and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322, 324, 333 (2000).

64. See Greenstein, *supra* note 63, at 333 (2000).

65. See sources cited *supra* note 63. Note this theory is different than those who argue that domestic work is allocated based on who can perform it most easily (by virtue of being in the household more). See BECKER, *supra* note 7; SHELTON, *supra* note 58. Those theorists suggest that the reason women specialized in domestic work was because they had more time or energy to devote to domestic tasks. This would suggest that women who worked full-time, though contributed less money, would work the same as the woman who contributed half the family income. Such is not the case. It is the earnings, not the hours, that matter.

66. The median earnings for women ages 25-34 working full-time was 82.9% of that of their husbands in 1997, and this does not even account for all the women who work part-time or not at all. See Ira Ellman, *Divorce Rates, Marriage Rates and the Problematic Persistence of Traditional Marital Roles*, 34 Fam. L.Q. 1, 23 tbl.3 (2000).

67. Greenstein, *supra* note 63, at 333.

68. See Brines, *supra* note 63, at 664-65; Greenstein, *supra* note 63, at 324.

men have the lowest earnings relative to their wives.<sup>69</sup> In those households the wife's share of the domestic work begins to climb back up, despite her greater earnings.<sup>70</sup>

The findings with regard to curvilinearity led to an alternative theory of why women continue to specialize in housework: gender. Because domestic work is woman's work, doing it (if one is female) or not doing it (if one is male) helps affirm gender roles.<sup>71</sup> A comparison of domestic work patterns in Sweden and the United States suggests that a relative resources theory better explained the division of labor in Sweden, while gender better explains it in the United States.<sup>72</sup> Focusing on those non-traditional families in which women earned more than men in this country, researchers theorized that traditional allocation of housework duties allows couples who otherwise challenge gender roles to re-establish them.<sup>73</sup> Julie Brines found that men who became economically dependent on their wives decreased the amount of housework that they did.<sup>74</sup> Theodore Greenstein found that both men and women in non-traditional families engaged in "gender deviance neutralizing" behavior<sup>75</sup> and Bittman et al. found that Australian wives who earned more than their husbands increased the amount of time that they spent on housework while the amount of time their husbands spent remained unchanged.<sup>76</sup> Further support for the gender relations theory comes from a study of gay and heterosexual couples in Vermont, which found that the same-sex relationship was more important than relative income in predicting the equalization of housework.<sup>77</sup> Same sex couples with disparate incomes had a more equal division of household labor than heterosexual couples with comparable incomes.<sup>78</sup>

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69. See Michael Bittman et al., *When Does Gender Trump Money? Bargaining and Time in Household Work*, 109 AM. J. SOC. 186, 194 (2003) (citing Sanjiv Gupta, *Gender Display? A Reassessment of the Relationship Between Men's Economic Dependence and their Housework Hours* (1999) (unpublished manuscript, on file with the American Sociological Association) (finding that in Australia, unlike in America, the greater amount of housework performed by wives was not limited to those households in which men earned significantly less than their wives).

70. Greenstein, *supra* note 63, at 333.

71. Brines, *supra* note 63, at 662.

72. Marie Evertsson & Magnus Neramo, *Dependence Within Families and the Division of Labor: Comparing Sweden and the United States*, 66 J. MARRIAGE & FAM. 1272, 1284 (2004).

73. See Brines, *supra* note 63, at 665 ("Indeed, [couples supported by wives' earnings] may resort to traditional housework arrangements as a means of reclaiming gender accountability in the eyes of self, partner, and others.").

74. *Id.*

75. Greenstein, *supra* note 63 at 332-33. Interestingly, Greenstein found this true regardless of the gender ideology of the couple. *Id.* at 332.

76. See Bittman, *supra* note 69, at 207.

77. Sandra Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 572 (2005).

78. *Id.*

Regardless of which theory best explains women's greater share of domestic work, it is clear that children make the division of household labor even more gendered. Women take on the majority of childcare duties. The more children in a household, the more total hours of domestic work performed, but the less the husband's total share.<sup>79</sup> Women who work more hours outside the home do less domestic work but not significantly less child care than women who do not work outside the home. In other words, women do not buy caretaking services as readily as they buy other domestic services.<sup>80</sup> This may be because a certain amount of caretaking simply cannot be bought.<sup>81</sup> Indeed, for many families, and ironically for the families that may be most likely to have a more equal division of household labor if there are no children present,<sup>82</sup> non-delegable childcare needs often plunge the household into complete specialization.<sup>83</sup>

Only 53% of married women with children under age one work at all, and the trend seems to be to not work, particularly for more advantaged

79. Harriet Presser, *Employment Schedules Among Dual-Earner Spouses and the Division of Household Labor by Gender*, 59 AM. SOC. REV. 348, 361 (1994).

80. Lorain Davies & Patricia Jane Carrier, *The Importance of Power Relations for the Division of Household Labor*, 24 CANADIAN J. SOC. 35, 35-51 (1999) (Canadian study); Robert Pear, *Married and Single Parents Spending More time with Children, Study Says*, N.Y. TIMES, Oct. 17, 2006 at A12 (reporting on a book by Suzanne Bianchi et al, showing that mothers spend "at least as much time with their children today as they did 40 years ago" even though many more mothers work). In a 1988 time diary study, Steven Nock and Paul Kingston found that though non-employed mothers spent more time with their preschool children than employed mothers, very little of that extra time (less than one hour) was spent in direct childcare. Steven L. Nock & Paul William Kingston, *Time With Children: The Impact of Couples' Work-Time Commitments*, 67 SOC. FORCES 59, 68-69 (1988). For school age children there was no difference between the amount of time that employed and non-employed mothers spent on childcare and play/education activities. *Id.* at 69; see also Suzanne M. Bianchi, *Maternal Employment and Time With Children: Dramatic Change or Surprising Continuity?*, 37 DEMOGRAPHY 401, 401 (2000) (finding that much of the time that women who specialize in domestic work spend at home is not actually spent in direct child care).

81. Most households have particularized clothing, eating, and planning needs that cannot be delegated. Someone has to decide what is to be bought, what is to be eaten, and which lessons to go to. For more on how this labor has been traditionally undervalued, see Katharine C. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 102-08 (1996). As children get older they also require emotional support and companionship that needs to come from a family member as a family member. A child wants to know what his parent thinks or believes about sex, God, race, etc. Parents simply cannot delegate those conversations to someone else.

82. Research indicates that the more educated are more supportive of gender equity. See Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis*, 38 SEX ROLES 239, 240 (1998). Couples with an expressed commitment to gender equity are more likely to share domestic duties more evenly; see also Greenstein, *supra* note 63, at 323-24 (concluding that men with commitment to gender equity are more likely to perform a greater percentage of domestic work, though not necessarily a greater number of absolute hours).

83. See *infra* notes 84-87 and accompanying text.



women.<sup>84</sup> Twenty-two percent of women with professional degrees do not work at all so that they can stay home with their children,<sup>85</sup> and the number of professional women working part-time has risen 17% since 1994.<sup>86</sup> Of mothers born between 1965 and 1979 whose household income exceeded \$120,000 a year, 51% are home full-time, compared to 33% of baby-boomer mothers.<sup>87</sup> Clearly, a sizable number of women opt out of the workforce. Why?

There appear to be two forces encouraging women to leave the workforce and enter the household full-time. The first is the pull of motherhood and children. The second is the push of work. The pull of motherhood can be expressed both as a need of the mother and a need of the children. Mary Blair-Loy quotes formerly highly-successful professional women suggesting that they are fulfilling their own needs by staying home: "I wanted so much to stay home."<sup>88</sup> "I'm very happy because I get to be with [my kids]."<sup>89</sup> Other mothers talk about the importance to their children of having a stay-at-home parent. "I don't care what anyone says, with these juggling routines, it's the *kids* who lose out."<sup>90</sup> "At a gut level, kids need to see their parents."<sup>91</sup> Many stay-at-home parents believe that their children will not get enough attention,<sup>92</sup> or the right kind of attention,<sup>93</sup> if it is not given to them by a parent. Importantly, there is rarely any discussion within these households of which parent should stay home.<sup>94</sup> If children need a parent, it is the woman that will assume that role, even if she earns as much or more than her husband.<sup>95</sup>

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84. Claudia Wallis, *The Case for Staying Home*, TIME, Mar. 22, 2004, at 52. The number of working married mothers with children under age one fell from 59% in 1997 to 53% in 2000 (and stayed roughly the same in 2002). *Id.* Although that drop may seem modest, economists suggest that it is quite significant. *Id.* The drop was also concentrated among white, well-educated women over age thirty. *Id.*

85. *Id.*

86. Laura DeMarco, *Generation X Embraces Family Life*, NEW ORLEANS TIMES-PICAYUNE, Sept. 12, 2004, at 10.

87. Wallis, *supra* note 84, at 53.

88. BLAIR-LOY, *supra* note 53, at 53 (quoting a former corporate attorney who had become a stay-at-home mother).

89. *Id.* at 59 (quoting a former banker who had become a stay-at-home mother).

90. *Id.* at 66 (quoting unidentified woman).

91. *Id.*

92. See Wallis, *supra* note 84, at 53 (quoting a business systems consultant who opted to quit work and stay at home with her eleven-month-old son instead of taking him to daycare as saying "I had one woman [at a daycare center] look at me honestly and say she could promise me that my son would get undivided attention eight times each day—four bottles and four diaper changes. . . . I appreciated her honesty, but I knew I couldn't leave [my son with her].").

93. *Id.*

94. BLAIR-LOY, *supra* note 53, at 82-87.

95. *Id.* Blair-Loy purposely analyzed the cases of highly successful women, many of whom made more than their husbands.

It is not just motherhood and children that pull women out of the workforce, however. It is the workforce that pushes women into motherhood. Studies of both men and women find that most Americans are working more hours than they would like.<sup>96</sup> Americans report doing this not so much because they need the money from the marginal hours of work, but because of the hourly structure of the work they do.<sup>97</sup> A study by Catalyst, a research firm specializing in gender and the workplace, found that 26% of women just below senior management level did not want to be promoted into senior management.<sup>98</sup> As one woman who had opted out of the workforce put it, “having a baby provides a graceful and convenient exit.”<sup>99</sup> Whatever the limitations of a life at home, it is often more attractive than the grueling life in the workplace,<sup>100</sup> particularly when workplaces refuse to try to accommodate part-time or reduced schedules.<sup>101</sup>

Notably, the workplace does not push fathers out at anywhere near the rate that it pushes mothers out, nor do children pull men into the home. Quite the opposite is true. The key variable affecting the number of hours that fathers work outside the home is not age, experience or number of children, but whether their wives work outside the home.<sup>102</sup> One study found that men with non-wage-earning spouses work approximately 4% more than men whose wives work outside the home, but they earn about 20% more.<sup>103</sup> More recent work suggests that while men who hold more egalitarian views about parenthood decrease the amount they work once a child is born, men who believe that children should be primarily cared for by their mothers increase the number of hours that they work once children are born.<sup>104</sup> While there was once thought to be a marriage bonus, signifying that married men earned more (on an hourly basis) than single men, the

96. See generally *IT'S ABOUT TIME* (Phyllis Moen ed., 2001).

97. *Id.* Similarly, people who work hours other than nine to five, Monday through Friday, predominantly do so because of the job demands, not because of their own preferences.

98. *Id.*

99. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 44.

100. One of Blair-Loy's subjects commented that caring for children “might sound humdrum, but I like it. I worked hard for so long. It's like a vacation.” BLAIR-LOY, *supra* note 53, at 55.

101. See Wallis, *supra* note 84, at 56. “Work is much more of a culprit in this than the more rosy view that it's all about discovering how great your kids are . . . . [M]any of the women I talked to have tried to work part time or put forth job-sharing plans and they're shot down.” *Id.* (quoting Hunter College sociologist Pamela Stone). See also WILLIAMS, *supra* note 51, at 72-75 (detailing the marginalization of part time work).

102. Tamar Lewin, *Men Whose Wives Work Earn Less, Studies Show*, N.Y. TIMES, Oct. 12, 1994, at A1.

103. *Id.*

104. Gayle Kaufman & Peter Uhlenberg, *The Influence of Parenthood on the Work Effort of Married Men and Women*, 78 SOC. FORCES 931, 944 (2000).

phenomenon is more accurately described as a “traditional family” bonus: it only applies to men whose wives do not work.<sup>105</sup> While these men may feel overworked,<sup>106</sup> they do not express a desire for more flexibility or part-time work.<sup>107</sup>

There is speculation, though no solid analysis, on why men whose wives do not work outside the home do better in the marketplace. Perhaps, as sole wage earners for the household, these men feel more pressure to earn more money, and therefore become more productive.<sup>108</sup> At a minimum, they appear to feel less guilt about working longer hours.<sup>109</sup> Perhaps because they do not express any need for flexibility, firms consider them more loyal and therefore more worthy of promotion.<sup>110</sup> Perhaps the executives in charge of pay raises are themselves sole wage earners and have more confidence in promoting someone whose life they understand more.<sup>111</sup> Whatever the reason, a woman’s decision to specialize in household work appears to make her husband better at specializing in paid work.

Critically, once a couple makes one specialization decision, increased specialization makes more and more economic sense and seems more and more inevitable. The wife’s ability to earn anything comparable to her husband’s salary decreases as she leaves the workforce, while his salary increases because she left the workforce.<sup>112</sup> His ability to share in household

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105. Joy A. Schneer & Frieda Reitman, *Effects of Alternative Family Structure on Managerial Career Paths*, 36 ACAD. MGMT. J. 830, 840 (1993).

106. Marin Clarkberg & Phyllis Moen, *Understanding Time Squeeze: Married Couples’ Preferred and Actual Work-Hour Strategies*, 44 AM. BEHAV. SCIENTIST 1115, 1127 (2001) (39% of husbands from specialized households feel like they work more than they would like, while only 36% of husbands from dual career couples feel that way). The men in the specialized households might feel more like they work too much because they do work more. The husbands from dual earner families probably feel like they occasionally have to prioritize family over work.

107. *See id.* at 1133 (noting that women usually prefer part time work while men do not); BLAIR-LOY, *supra* note 53, at 194 (top 15% of management (predominantly men) are not interested in more flexible work schedules).

108. This idea conflicts with the sentiment of some dual-career fathers who argue that having to balance work and home demands makes them work more efficiently. *See Lewin, supra* note 102, at A1 (“I’m just as productive as [men whose wives are at home]. I work smarter now that I have kids. . . . I don’t do all the meaningless social stuff that can take up a lot of hours.”).

109. *See id.* Lewin quotes a New York real estate investment manager as saying:

Knowing a parent is with the kids all day long removes the terrible sense of conflict and guilt if I have to work late[.] . . . I leave the house at 6:10 in the morning, before the kids are awake, and if I don’t get home before they go to bed at 8:30 I miss them, and that’s hard for me, but I don’t feel as worried as I used to that they’re not getting enough parent time.

*Id.*

110. *See* BLAIR-LOY, *supra* note 53, at 21-24 (explaining the role of the work devotion schema in the life of professionals and firms).

111. *See* Blair-Loy & Wharton, *supra* note 53 (vast majority of top 15% of management had stay-at-home spouses).

112. *See supra* notes 103 & 105 and accompanying text. This is not true, of course, if they are in very different professions and hers is much more lucrative than his, but that is not that common. *See* Ellman, *supra* note 66, at 23 tbl.3 (noting that wives earn more than husbands in only 17.2% of dual-

work diminishes as he works harder, but more importantly, the need for him to participate in any household work diminishes because, as a stay-at-home spouse, it is clearly her job. This division of labor does come at a cost to her. Data from same-sex parents who divided labor along traditional lines (with one stay-at-home spouse and one wage-earner) suggests that the spouse who does not work outside the home feels like her work is less valued and that she has less bargaining power within the partnership.<sup>113</sup> If a stay-at-home spouse wants to go back to work part-time, she should not expect her husband's share of the domestic work to increase. Husbands usually only increase their domestic work if their wives work full-time.<sup>114</sup> Even if she does work full-time, her ability to get him to do more domestic work depends mostly on her earnings relative to his, and given how her exit from the job market will likely result in a large disparity between his and her wages, he is not likely to do much domestic work.<sup>115</sup> Specialization sticks.

These dangers of specialization do not seem to worry the couples that continue to specialize. From their perspective, specializing within the household appears to be an ideal, pareto optimal arrangement. It is the operation of the household as a unit that allows mothers and fathers to divide up caretaking and market work in ways that seem to best suit everybody's preferences. Once children arrive, it is, for the most part, women who express a preference for more domestic work and less market work and men who express a relative preference for market work.

Consider the reasons given by some of Blair-Loy's subjects who chose to specialize in domestic work: "Maybe it's genetic . . . . I have more of a link [to my kids] than my husband does."<sup>116</sup> "We joked about my husband staying home. . . . There are mechanisms of nursing a child. You can't get away from the fact that women bear children."<sup>117</sup> Their husbands, on the other hand, appeared ill-suited for childcare. "[T]he day-to-day stuff is harder for men." "It would drive him crazy."<sup>118</sup> "He doesn't have the same guilt that I have. He doesn't worry that it's going to hurt them."<sup>119</sup>

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earner marriages, though the table does not include those couples in which the husband does not work at all).

113. Maureen Sullivan, *Rozzie and Harriet? Gender and Family Patterns of Lesbian Coparents*, 10 GEN. & SOC'Y 747, 764 (1996) (finding that stay-at-home lesbian mothers experience a decrease in their ability to negotiate for their own needs after they became economically dependent).

114. See discussion *supra* note 61.

115. See Sullivan, *supra* note 113, at 764 (arguing that the decision to specialize depends mostly on "relative income and earning potential").

116. BLAIR-LOY *supra* note 53, at 84.

117. *Id.* at 83 (emphasis added).

118. *Id.* at 84.

119. *Id.* at 69.

Just as important, fathers often seem more tied to market work: “[M]y husband loves his work. For him to make a change would be change of such magnitude, such importance to him personally[,] . . . the price associated with that would be very high.”<sup>120</sup> “[H]is mind is always thinking about [work].” “He’d be very antsy to get back to work.” “He *is* very concerned about the kids. He’s just more distracted by work.”<sup>121</sup> What these mothers are expressing reflects what those who study gender have concluded: “[B]readwinning has remained the great unifying element in fathers’ lives. Its obligations . . . shape their sense of self, manhood, and gender.”<sup>122</sup> As one literature review makes clear: “the breadwinner role is socially defined as men’s primary family role.”<sup>123</sup> Indeed, the importance of the role of provider to the masculine psyche may be so important that some men cannot feel connected to their children unless they provide.<sup>124</sup>

Thus, we have one class of people, overwhelmingly women, who would rather divert some energy from market work to unpaid caretaking, and another class of people, overwhelmingly men, who would not.<sup>125</sup> Together they embark on the project of parenting and it is all too obvious how they come to the agreement that they do. Mothers do the caretaking work of parenthood in return for fathers doing the providing work of parenthood.<sup>126</sup> Children need both quality care and money, and these couples decide that the way to maximize the children’s receipt of both is for the parents to specialize.<sup>127</sup> In this agreement, mothers get the use of the father’s money

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120. *Id.* at 72.

121. *Id.* at 68.

122. ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY 2* (1993).

123. Joseph H. Pleck, *Husband’s Paid Work and Family Roles: Current Research Issues*, in *RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES, FAMILIES AND JOBS*, 251, 305 (Lopata & Pleck eds., 1983).

124. Shawn L. Christiansen & Rob Palkovitz, *Why the “Good Provider” Role Still Matters: Providing as a Form of Paternal Involvement*, 22 *J. FAM. ISSUES* 84, 96-97 (2001) (quoting a father who felt more distance from his children because he was not providing for them financially, even though he spent most of every day with them).

125. There are some couples who reverse these roles. The U.S. Census reports that in 2003, there were 156,000 fathers who reported leaving the workforce in order to care for their children. The same report indicated that there were well over 6 million mothers who did so. U.S. DEP’T. OF COMMERCE, *AMERICA’S FAMILIES AND LIVING ARRANGEMENTS 11* fig.4 (2003).

126. Caretaking work changes over time. When children are very young, it requires some degree of consistent, loving interaction. As they get older, it requires less direct supervision, but much more management. There is coordination of classes and practices and social life. There is also a certain amount of just being available to address needs and answer questions as they arise. Much of this may not need to be done in person, but it is important for children to have someone who is not so distracted by work that they cannot answer the questions as needed. See Bianchi, *supra* note 80, at 405 (suggesting that because many mothers who specialize in domestic work actually spend a small portion of their time in direct caretaking, but much of their time “being available,” and that it may be the case that technological connections like cell-phones and BlackBerrys can make working parents more easily available).

127. Many dual income couples and single parents believe that quality care can be purchased. Studies indicate that quality day care, at least if used in moderation (less than 45 hours a week), has

for themselves and their children. They earn the right to that money by taking care of the people and things that make the household run. Fathers get the knowledge that their children are being well cared for and they get children who are raised to love them. They get Father's Day gifts and little league games and kisses on the nights when they are home. They get these things, for the most part, by buying them. On average, fathers in this country spend less than an hour a day in solo child care, and men with stay-at-home spouses likely average much less than that.<sup>128</sup> For sure, most specializing fathers love their children and enjoy much of the time they spend with them, but they do not earn the love of their children like their children's mothers do. They buy it.

Is there anything wrong with allowing parenthood to be divided up into subspecialties in this way? Why shouldn't the law honor the specialization agreement that these parents come to?

Currently, the law honors the specialization agreement indirectly in a number of ways,<sup>129</sup> but only enforces it explicitly at divorce. When the household breaks up, the one who specialized in caretaking asks the law to make sure that she (and the children) get paid and the one who specialized in making money asks the law to make sure he has the opportunity to caretake. The law honors the specialization agreement by granting both parties the right to that in which he or she did not specialize. When it does so, the law says several things. First, it says that despite universal laws prohibiting the sale of children,<sup>130</sup> parenthood can be bought. The parent who perfects his

no detrimental behavioral effects on children and may have positive cognitive effects. Deborah Lowe Vandell, *Early Child Care: The Known and the Unknown*, 50 MERRILL-PALMER Q. 387, 407 (2004). Much of what caretaking parents do cannot be purchased, however. Much organizational work, decision-making, counseling, emotional support and companionship simply cannot be bought. See Silbaugh, *supra* note 81, at 100-08. The time and effort demanded by this sort of work should not be minimized. Couples that do not specialize share this work. In other couples it is delegated to the one who specializes in caretaking.

128. Diane Ehrensaft, *When Women and Men Mother*, in MOTHERING: ESSAYS IN FEMINIST THEORY 41, 41 (J. Trebilcot ed., 1983) (12 minutes of solo child care); Graeme Russell & Norma Radin, *Increased Paternal Participation*, in FATHERHOOD AND FAMILY POLICY 139, 142 (Michael Lamb & Abraham Sagi eds., 1983) (12-24 minutes). These studies are old and the amount of time that men spend in childcare is increasing. Laura Sanchez, *Gender, Labor Allocations, and the Psychology of Entitlement Within the Home*, 73 SOC. FORCES 533, 546 (1994). More recent studies show that married fathers spend a little less than an hour a day on child care (with no indication as to whether it is solo or joint child care). See Pear, *supra* note 80, at A12 (married men spend 6.5 hours a week in child care, up from 2.6 hours in 1965). But for men who are specializing in paid work and working 60-70 hours a week, there is simply not enough waking time to devote to any childcare much less solo child care.

129. As noted above, welfare policy, tax policy and spousal support law all assume the legitimacy, if not primacy, of the specialized household as a unit. See *supra* notes 1-4 and accompanying text.

130. See, e.g., UTAH CODE ANN. § 76-7-203(2) (2006) (providing that selling a

specialization in market work buys his parental rights; that is, he buys the right to foster a child's development, to cultivate his love and to share his companionship. Few have questioned the right of those who provide for children to share in their companionship,<sup>131</sup> but if we conceptualized child support as a duty resting partially, if not completely, on the state, would we be so willing to commodify parental rights in this way?

Second, by enforcing the specialization contract, the law legitimates the gendered division of labor.<sup>132</sup> This division of labor is voluntary, but it may also be troubling. The disproportionate amount of domestic work that women perform,<sup>133</sup> regardless of whether they work outside the home, should lead us to question whether the division of labor within the standard specialization agreement is truly chosen. If we assume that there is something problematic in the consistent and stark fact that women continue to do vastly more dishes and laundry than men do, why do we assume that there is nothing troubling about the fact that women continually do so much more child care? As Julia Wood writes, "encouraging women to continue caring for others because it is good, it needs to be done, and no one else will do it, [encourages women] to participate—or continue participating—in their own subordination."<sup>134</sup> "No matter how important, it can be extremely costly, even self-negating, if only some people are expected to care for others . . . ."<sup>135</sup> There is a difference between doing the dishes and wiping your child's nose. The latter is, strangely enough, much more rewarding, and most mothers probably want to caretake more than they want to clean. They willingly cut back on some of their market work to do so.<sup>136</sup> To assume, though, that women choose their complete economic marginalization and to facilitate their ability to make that choice accepts as permissible the range of options available to women. There is a great deal of evidence that what women want to do is both caretake and provide.<sup>137</sup>

Third, at divorce, it becomes clear that specialization, while efficient for the household when it was together, is not good for the parents—or the children—once they split. At divorce, the specializing couple acquires the

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child is a "third degree felony").

131. The ALI, for instance, states that anyone who assumes a parental obligation (to provide support) is automatically entitled to parental rights (to a relationship). See PRINCIPLES, *supra* note 4, at § 2.03(b).

132. See Jane Ruthford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 *FORDHAM L. REV.* 539, 562-63 (1990) ("Some have proposed that alimony should equalize the risk between the various specialties within a marriage . . . [but it] seems to perpetuate the vicious circle of women assuming more household duties because they earn less and then earning less because they have more household duties.").

133. See Juster & Stafford, *supra* note 59, at 475 tbl.1.

134. JULIA WOOD, *WHO CARES? WOMEN, CARE AND CULTURE* 166-67 (1994).

135. *Id.* at 163.

136. See Belkin, *supra* note 99, at 45.

137. See Clarkberg & Moen, *supra* note 106, at 1133; see also WILLIAMS, *supra* note 51 at 2, 82.

balancing needs that all those who could not afford to specialize already have. Consider the plight of divorced fathers whose families specialized before the divorce. At divorce, most of these fathers want to do significantly more caretaking than they did while they were married. The presumptions of joint custody that some states have instituted,<sup>138</sup> the call of fathers' rights groups for fathers to be treated as something other than just a paycheck,<sup>139</sup> and the growing literature on the importance of a father's regular presence in children's lives,<sup>140</sup> are all at odds with the idea of specialization. The traditional visitation schedule, one night a week on weekdays and every other weekend, gives most fathers much more one-on-one time with their children than they had while married.<sup>141</sup> If it is important or desirable for divorced fathers to maintain significant and on-going parental relationships with their children, and if they want those relationships to be about much more than providing, then we should question the legitimacy of the specialization contracts that existed prior to divorce.

Next, consider the plight of divorced mothers. At divorce, mothers who specialized in caretaking are likely to get primary custody of the children precisely because they specialized in caretaking. Most states assume that the stability needs of the child and the expectations of the parties are best met by preferring the primary caretaker in custody decisions.<sup>142</sup> These women also need to work, though. At divorce these women need workplaces unlike the ones that pushed them out or caused them to work part-time because the vast majority of divorced mothers must work more once divorced than they did during the marriage. Even with child support payments, the mother's paycheck is the largest source of household income for most custodial

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138. See, e.g., CAL. FAM. CODE § 3040 (Deering 2006); FLA. STAT. ANN. § 61.13 (LexisNexis 2006). See generally Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L. Q. 367, 467 (1989).

139. See Matthew Bowers, *Fathers Fight Back*, VIRGINIAN-PILOT & LEDGER STAR, June 6, 1995, at E1 (arguing that non-custodial fathers should play a role more important than just "sending a monthly check"); see also Chris Sturgis, *Fathers Group Pushes for Shared Role*, TIMES UNION (Albany, N.Y.), Oct. 27, 1996, at C6 (quoting president of Father's Rights' Society saying "a father should be more than a paycheck").

140. See DAVID BLANKENHORN, FATHERLESS AMERICA (Basic Books 1995); DAVID POPENOE, LIFE WITHOUT FATHER (1989).

141. The most recent studies suggest that fathers spend 6.5 hours a week in child care. See Pear, *supra* note 80, at A12.

142. This does not mean that the primary caretaker gets sole custody all the time. Many states use a variety of shared custody arrangements. See Freed & Walker, *supra* note 138, at 454-66. However, courts routinely take primary caretaking into account when making the custody decision. See, e.g., MINN. STAT. ANN. § 518.17(1)(a)(3) (2006); Burchard v. Garay, 42 Cal. 3d 531, 541 (1986). Additionally, a primary caretaker is likely to get more time with her children than a secondary caretaker. The new ALI Principles suggest that the custody arrangement after divorce should track the caretaking arrangements during marriage. See PRINCIPLES, *supra* note 4, at § 2.08.



households unless the mother has remarried.<sup>143</sup> At divorce, the combined family costs have gone up dramatically because the combined income must now support two households. Meanwhile, the primary caretaker's ability to rely on the other parent for regular or emergency care has decreased because they no longer live together. Specialization is no longer an option, and that means that divorced caretakers are desperate for balance.

When asked if she was worried about what might happen to her in the event of divorce, one formerly successful lawyer, now out of the work force to care for her children, said, "My degree is my insurance policy."<sup>144</sup> She may think of it that way, but it is not a very effective one because the only thing to which it entitles her is a job back in the same unbalanced working world that she left.<sup>145</sup> Finding the right balance with less household income and only one adult presence makes working even harder.

The one group of women who may not need balance at divorce is women who were married to very rich men.<sup>146</sup> Sufficiently high child—and spousal—support payments can finance a house with a stay-at-home caregiver, but it is not clear what goals we serve by allowing women to rely on those payments. Divorce is supposed to permit ex-spouses to achieve some degree of independence from each other.<sup>147</sup> This has never been fully possible if children are involved,<sup>148</sup> but it is still considered an important objective. Allowing the stay-at-home spouse, particularly an educated one

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143. Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 491 (1985); Elaine Sorensen & Chava Zibman, *To What Extent Do Children Benefit from Child Support? Assessing the New Federalism* 5 (Urb. Inst., Discussion Paper No. 99-11, 2000), available at <http://www.urban.org/UploadedPDF/discussion99-19.pdf> ("In 1996, on average, just over two-thirds of . . . [custodial] family income came from earnings.").

144. Belkin, *supra* note 99, at 42.

145. See, e.g., *supra* note 101 and accompanying text (describing how the workplace is not amenable to women who need to work part-time or otherwise modified schedules).

146. See *supra* notes 53 & 100 and accompanying text. See also Linda Hirshman, *Homeward Bound*, AM. PROSPECT, Dec. 20, 2005 (85% of the brides listed in the New York Times Sunday wedding section who had had children were not working full time eight years after their wedding).

147. Consider this quote from a leading text in Family Law:

The divorce revolution implied far more than a change in the grounds for marital dissolution. Divorce policy now sought to relieve spouses of a relationship that was "socially dead" so that they might seek new and more satisfying relationships. Given this policy, several propositions seemed obvious. One was that judicial decrees should end, as far as possible, all personal and economic ties between the spouses. Second, the abandonment of fault grounds, coupled with the emerging emphasis on gender equality, implied that both spouses should become equal and independent social and economic actors after divorce and that neither spouse should be especially burdened by the divorce decree.

LESLIE J. HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, FAMILY LAW 389 (2005).

148. As long as both parents have some right to visitation or custody, the parents have to remain in relationship with each other to coordinate schedules for visitation, if nothing else. Usually the ongoing relationship is more extensive, involving money transfers and fundamental decisions about the course of children's lives, such as where they should go to school, and what activities they should participate in.

capable of earning a decent salary, to contribute nothing financially to her own needs or those of her children, seems at odds with the idea of independence and wholly inconsistent with the messages about providing that we send to other mothers. Indeed, studies indicate that women who have never had the luxury of fully relying on someone else for their children's support define providing as part of their motherly duties.<sup>149</sup> It appears that the only parents who do not consider providing to be part of the parental obligation are those in the fairly small class of women who have opted out, or severely cut back on their labor force participation. Allowing these mothers to contract out of providing as part of their parental definition keeps them dependent on their ex-husbands, not only for the lives of their children but for years thereafter.<sup>150</sup> It discourages them from developing the sense of autonomy and power and pleasure that can come from working and filling multiple roles.<sup>151</sup>

Dependence is a pejorative word though and these women knowingly chose to leave the workforce. One might simply view these mothers' dependence on their ex-husbands as their contracted-for entitlement. They kept up their side of the bargain by taking care of the home, so he has to keep up his side of the bargain by providing. Some scholars endorse precisely this approach. They suggest that the best way to protect divorced mothers is to do a better job of enforcing the specialization contract. Dispensing with the notion of marginal household expenditures, these authors say simply: share equally because that was the underlying assumption of the specialization contract. One proposal suggests combining the income of both parents and dividing the amount in proportion to the number of people in each post-divorce household.<sup>152</sup> Another proposal endorses a shared income formula that equalizes the households' standards of living during the children's dependency and for some years thereafter.<sup>153</sup>

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149. See Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* 45-48 (Glenn, Chang & Forcey eds., 1994) (describing how different the meanings of motherhood look to women of color than to white women); J. Hennessy, *Welfare to Work: Poor Single Mothers Navigate the Changing Landscape of Welfare Assistance* (unpublished masters thesis) (cited in BLAIR-LOY, *supra* note 53 at 194-95) (describing women with a dual commitment to work and family).

150. One cannot expect women who have been out of the labor force for two decades (if they have more than one child and remain at home until their children are eighteen years old) to effortlessly slide back in.

151. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1908-12 (2000) (citing numerous studies showing that people derive pleasure and power from serving multiple roles at one time and that women are happier when they work and have children).

152. See Rutheford, *supra* note 132, at 577-92.

153. See WILLIAMS, *supra* note 51, at 129-31 (proposing the idea of equalizing standards in order to protect older wives from long-term marriages who have particularly weak work prospects).

Enforcing the specialization contract more perfectly may well make the post-divorce lives of women who specialized in caretaking better. It will redistribute more money from non-custodial households to custodial households. It will do little, though, to help those men and women who yearn for less specialization. This class of people likely includes most divorced parents, certainly includes all parents who never married, probably includes most two-earner couples, and also includes many of the women who specialized in caretaking only because balance was impossible.<sup>154</sup> To serve this larger group of people, perhaps we should not enforce the specialization contract at all.

Recall that a main reason couples specialize is because women think their husbands are ill-equipped for or bad at caretaking.<sup>155</sup> The women in Blair-Loy's study, all of whom were able to provide as well as caretake, believed their husbands were too distracted by work<sup>156</sup> and unable to handle the day-to-day business of caretaking.<sup>157</sup> One mother was quoted as saying her husband "doesn't think to look in [the child's] school folder."<sup>158</sup> Another said her husband did not have the initiative necessary to figure out whether their son needed a dentist appointment.<sup>159</sup> Still another said that she and her spouse never really considered having him assume the caretaking duties.<sup>160</sup> It is possible that these husbands are truly disorganized and unable to incorporate their child's needs into their schedules—but it is highly unlikely. These are very successful, driven men who must take great care on a daily basis to see that many tasks are done. They have plenty of initiative. They just do not choose to apply these skills to their parenting. Fathers avoid caretaking work either by appearing bad at it, or having the power, within the relationship, never to discuss it.<sup>161</sup> This, in turn, allows them to keep focused on their work. It allows them to parent by providing.

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154. See *supra* text accompanying notes 100-02 (noting that the inhospitable workplace pushes women out).

155. See generally Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 948 (1962) (exploring the idea of having the power to submerge an issue). For an article exploring how that kind of power operates in marriage, see Aafke Komter, *Hidden Power in Marriage*, 3 GENDER & SOC'Y. 187, 189, 212 (1989) (illustrating the power to submerge an issue by noting wives who anticipate husbands' needs and preferences and therefore do not raise an issue that would cause conflict).

156. See *supra* text accompanying note 121.

157. See *supra* text accompanying notes 118-20.

158. BLAIR-LOY, *supra* note 53, at 70.

159. *Id.* at 68.

160. See *supra* text accompanying note 117.

161. See *supra* sources cited note 155. Some mothers enable and may even encourage the lackluster parenting performance of fathers by refusing to let fathers muddle through the inevitably difficult tasks of learning their children's needs and wants. Rhona Mahoney refers to this phenomenon as "gatekeeping." See RHONA MAHONEY, *KIDDING OURSELVES: BREADWINNING, BABIES, & BARGAINING POWER* 78 (1995). Afraid to lose their primary parent role, these mothers fail to encourage and oftentimes criticize father's participation. To the extent that gatekeeper women also express a desire for balance, they must come to understand that balance between work

## IV. A RADICAL ALTERNATIVE

Imagine a system in which men are not afforded the luxury of being too distracted by work. Imagine a system in which parenting is defined as giving children that which they need: quality care and money. To be a parent, one would have to do *both*. All parents would have an obligation to do paid work to help support their children and all parents would have an obligation to spend time with their children. At divorce, if one had not been in a significant (defined in terms of time) relationship with one's child, one would have no enforceable claim to time with that child. Support for the child would come from the people who had developed a significant relationship with the child and wanted to accept the rights and responsibilities of parenthood.<sup>162</sup> At least this would be the default rule.<sup>163</sup> Instead of the mandatory regime currently in place, which encourages specialization by treating parents as a unit, we could institute a regime that treated parents as individuals, each with a responsibility to perform the caretaking work and fulfill the financial obligations of parenthood.

Most people in this country, at least initially, would not be dramatically affected by the change. Seventy-four percent of mothers work outside the home and contribute to their children's material welfare already. Child support payments help these households, but only marginally.<sup>164</sup> Studies

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and home starts with balance within the home.

162. All caregivers would also be entitled to state support. See discussion *infra* text accompanying notes 173-74. However, as in the welfare setting today, there would be an assumption that caregivers who received funds from the government would work. Under this scheme, absent extraordinary circumstances, paid caregivers would not be entitled to parental rights because (i) they did not support the child, and (ii) their relationship with the child did not develop as one that was supposed to exist outside the market. See *In re Hood*, 847 P.2d 1300, 1301 (Kan. 1993) (holding no visitation to paid caretaker); see also *Argenio v. Fenton*, 703 A.2d 1042, 1044 (Pa. Super. Ct. 1997) (opining that a grandmother who performed baby-sitting duties had no intent to be bound to the legal duties and obligations of a parent and thus could not obtain custody of her granddaughter).

163. Both theory and empirical research regarding contracts suggest that defaults matter. See Ian Ayres, *Menu Matter*, 73 U. CHI. L. REV. 3, 4 (2006) ("Merely by changing the default, lawmakers can affect the equilibrium."); see also Yair Listokin, *What Do Corporate Default Rules and Menu Do? An Empirical Examination* (Aug. 16, 2006) (unpublished manuscript, on file with Yale Law School) (demonstrating that defaults matter in corporate law).

164. As indicated, the custodial parent's earnings are by far the largest source of income in custodial households. Sorensen & Zibman, *supra* note 143, at 5. Moreover, the average amount of child support received is \$3,795 a year, an amount not much different than what a universal child allowance would likely provide. See *id.* The average amount of child support received by households below the poverty line is \$3,000 (which accounts for just over 40% of their family income). TIMOTHY S. GRALL, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS 7 (2003). Thus, child support payments provide a greater percentage of household income for the very poor (households in which the custodial parent has a difficult time finding regular employment) and the rich (households in

also indicate that many men are performing more childcare, particularly in dual-income families<sup>165</sup> and in non-elite families.<sup>166</sup> These men would not have to sacrifice relationships with their children. At divorce, these couples would share providing and caretaking duties as before the divorce.

For the elite couples that benefit from specialization, however, the change would be significant—and it could well have important indirect benefits for everyone else. A decision to work seventy hours per week would be very risky for anyone who wanted to ensure a future relationship with his or her children. In such a world, the push for more flexible hours, on-site daycare, and job sharing arrangements would come not only from women saddled with too much caretaking responsibility, but also from men, eager to ensure that they had accepted enough caretaking responsibility.

Elite women would also have to reconcile themselves with significant change. They would no longer be able to rely on their husbands for child support in case of divorce. They would have to view themselves as at least partial providers for their children. As providers, elite women would be much less likely to simply leave the workforce.<sup>167</sup> They would be much more likely to fight for meaningful, well-compensated, part-time or reduced-time employment. They would be much more interested in establishing high quality daycare and comprehensive pre- and after-school programs. They might also be less willing to accept the “quaint” caretaking failings of their husbands, and demand more caretaking support from their spouses so that they could earn a respectable livelihood.<sup>168</sup>

As these elite workers re-adjusted their home and work schedules, the norms of work and the norms of parenting would change. If the CEO only worked a forty-hour week, he or she would not demand fifty to sixty hours from a subordinate. As more and better daycare became a reality, more and more working and middle class women would have more time to advance their own working status. As more quality workers demanded flexible schedules, part-time work would become less marginalized. These consequential indirect institutional changes could effectively ease the juggling burden that most working and middle class parents now face.

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which the custodial parent may not have been working at all). A universal child support allowance would replace the money going into poor households, though not the money going into rich ones.

165. Men do approximately 40% of the domestic work in families where the adults earn equal amounts. Laura Sanchez, *Gender, Labor Allocations, and the Psychology of Entitlement Within the Home*, 73 SOC. FORCES 533, 546 (1994) (noting that the share of child care done by men has increased in the last 20 years).

166. M.R. Nakhaie, *Class, Breadwinner Ideology, and Housework Among Canadian Husbands*, 34 REV. RADICAL POL. ECON. 137, 152 (2002) (pointing out that men in working and managerial classes do more housework than men in elite households).

167. See *supra* notes 100-02 and accompanying text (discussing how women leave the workforce because it is not pleasant or accommodating).

168. See *supra* text accompanying notes 116-21 (suggesting that husbands cannot focus on children the way that wives can).

Because it is logistically difficult to ensure that all caretaking duties are shared completely equally, the regime could assume that full parenting rights would attach as long as one performed a sufficiently high percentage of caretaking. To give some leeway for those couples in which the parties do not earn equally, and to recognize some degree of relative preference between men and women, the regime could presume parental rights for any parent who performed at least 30% of the non-delegated caretaking duties. This would be a default rule, so parties could bargain for more or less, and legislatures could set the legal default at a different percentage if they so desired. Absent an explicit contract to the contrary, however, any division of caretaking labor more extreme than the legal norm would result in the worker parent relinquishing parental status. He would not be responsible for paying for his children, but neither would he be entitled to see them.<sup>169</sup>

Under this system, a woman who specialized in caretaking would be at grave risk of poverty at divorce. For her sake, and for the sake of the millions of working class people whose wages cannot lift their children out of poverty, this system would need to rely on a universal child allowance program from the state. Because the people we now think of as parents would not necessarily be directly financially responsible for children, that is, because the household would not be considered the unit from which child support payments should be derived, we would need an alternative paradigm for support. Regular, automatic payments from the state to children, similar to the systems in place in Western Europe, could serve this purpose.<sup>170</sup> In effect, all exclusive caretakers would be treated as most welfare recipients are, or should be, treated today. They would be encouraged, trained, and helped to find sustainable work that can be reasonably balanced with caretaking responsibilities.<sup>171</sup>

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169. It is possible that many fathers simply would not care enough about maintaining their legal relationship with their children. Perhaps they would be willing to rely on the chance that their children would idealize and love them sufficiently from afar. They may, but as non-parents, they would have no standing to pass judgment on or secure legal intervention regarding anything (i.e., moving, schooling, medical care, joining a religion) that their ex-spouses did. If large numbers of fathers really behave this way, one needs to question why we have the presumptions to visitation and custody that we have now. See discussion *supra* note 142 and accompanying text.

170. Most of the industrialized world provides much more expansive allowances to caretakers of children than does the United States. See SOC. SEC. ADMIN., PUBL'N NO. 13-1-11805, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD—1997 xxv-xxvi, xxx-xxxv.

171. Failure to find such work would probably not result directly in termination of benefits, but it might lead to a transfer of primary custody to another parent—and that parent would then receive the bulk of the child allowance. In any event, it is hard to imagine the elite women who have specialized in caretaking relying solely on the child allowance for income because they would have to completely invert their standard of living in order to caretake full time.

This kind of child allowance, alone, might not be enough to lift the child out of poverty or support a child at the level she would have enjoyed in an intact household, but when coupled with wages, it would be an entitlement that could help ensure that the child's basic needs were met.<sup>172</sup> The entitlement would be based on the child's dependence, not the circumstances of his birth. All children are dependent; thus all children would receive it.<sup>173</sup> As a universal entitlement, not a charitable response to poverty, this allowance would likely be treated with more respect, both financially and culturally, than are current welfare payments.<sup>174</sup> When combined with institutional changes to the workplace and to the childcare system, this sort of child allowance could substantially improve the lives of the millions of children currently living below or just over the poverty line.

To many people this may seem like a completely disastrous idea. In the worst case scenario we would be confronted with more poor women and bands of unattached, rich men. This is possible, but extremely depressing and probably unlikely. If such a large block of men are not willing to do even 30% of caretaking, then surely the way that we currently protect providers' rights to relationships with their children after divorce is misguided. Most men, if confronted with the choice of losing their paternal relationship or working less will probably choose to work less. That is exactly what the growing class of custodial fathers has to do. The most frequently reported work-related changes for custodial fathers after divorce involve balance issues: having to arrive late, leave early, miss work, or decline travel in order to take care of their children.<sup>175</sup> Imagine how much these men would welcome a world in which all their male peers grappled with the same caretaking issues.

Alternatively, some people may think that this proposal will do nothing because elite couples will simply contract around the default and into the specialization arrangements that they currently have. This they may do, but at a minimum, the proposed default rules should have substantial information-forcing effects.<sup>176</sup> Those elite couples that want to specialize

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172. See J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 820-21 (1997) ("After all government transfer payments, the average income of single-parent families in the Untied States is about 54% of that of a two-parent family. In France the comparable percentage is 76%, and in Norway it is 86%.")

173. Funding for this program could come from a variety of sources. It could be financed from general revenue—as Social Security is now—or from a special tax imposed on procreators who spent less than a certain portion of their income providing. See *supra* note 36.

174. Consider the difference between the populace's response to Social Security payments, a universal entitlement available to people regardless of class, and its response to welfare payments, which only go to the needy.

175. Geoffrey Greif, *Single Fathers With Custody Following Separation and Divorce*, in *SINGLE PARENT FAMILIES* 213, 222 (Hanse et al. eds., 1994). There is a dearth of research on the economics of single-father households. See *id.* at 111.

176. See generally Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992).

will have to work out the particulars of their specialization contract. As they leave the workforce (when their bargaining power is probably at its height), mothers will have to think about what they will have to sacrifice professionally and how much they think their husbands should pay for it. Fathers will have to think about how much caretaking they really want to buy themselves out of. They will have to articulate why they should be able to opt out of the low-status work of caretaking. The thousands of couples that seem to effortlessly and sub-consciously assume very gendered divisions of labor once children arrive will at least have to make conscious decisions to do so.

This alternative world is actually not nearly as radical as it sounds. Proposals for child allowances comparable or greater than the ones used in most of Western Europe have come from a notable spectrum of scholars.<sup>177</sup> Vicki Schultz has eloquently argued that paid work (and hence a notion of providing) must be central to both mothers' and fathers' lives.<sup>178</sup> The vast majority of people who have analyzed what happens to specialized households at divorce agree that fathers reap most of the benefits of specialization.<sup>179</sup> Suggesting that we must hold fathers more accountable is nothing new.

What is new—and disruptive—about the ideas offered here is that they tackle the provider role head-on by challenging men's ability to assume it exclusively. This idea is alarming on its face because millions of children in this country need more resources, and men (at least relative to women) are the people who have those resources. Why abolish one of the few mechanisms we have for transferring resources from the haves to the have-nots? Because the intrahousehold transfer model that we have relied on to effectuate those transfers leaves the specifics of the transfer up to each individual household. That means that each household, in constructing a

177. See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 Yale L.J. 967-971-72, 994-95(1999) (endorsing a program of unconditional cash grants to mothers); see also BARBARA BERGMANN, *SAVING OUR CHILDREN FROM POVERTY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE* 123-24 (1996) (suggesting that the United States should adopt the kind of child allowance policies used in France); MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 231-32 (Routledge 1995) (endorsing a program of government support to mother-child dyads).

178. See Schultz, *supra* note 151, at 1883-86.

179. See WILLIAMS, *supra* note 51, at 126 (arguing that men can take too much of their ideal worker wages with them, while still enjoying the benefits of their ex-wives' caretaking); see also Rutheford, *supra* note 132, at 577-84 (endorsing a shared income formula); Allan Parkman, *Bargaining Over Housework*, 63 AM. J. ECON. & SOC. 765 (2004) (arguing that it is too easy for men to leave women with too little); Lloyd Cohen, *Marriage, Divorce, and Quasi-Rents: Or, I Gave Him the Best Years of My Life*, 16 J. LEGAL STUD. 16 (1987) (arguing that divorced women are in a much worse situation than are divorced men).



system for transfer, must grapple on its own with the tension between providing and caretaking. In households that can afford to, the simplest and most efficient solution is often specialization, and specialization at the elite level can make balance at all other levels difficult.

Specialization is simple and efficient for those who can afford it because it tracks traditional gender roles and it conforms to the idealized household model.<sup>180</sup> Changing the legal regime so that those who wanted to specialize at least had to articulate the terms of that specialization, and reject the legal norm, would make it easier for women (or men) who wanted something less than complete specialization. It would change the shadow of the family law regime in which the parties reach their specialization agreement.<sup>181</sup>

Currently, women who want to do less caretaking (or have their spouses do more caretaking) bargain in the shadow of a child support system that facilitates specialization by treating parents as a unit. Women trying to demand more caretaking time from their spouses under this system do not usually fare well in the bargaining process. They lose because they earn less money than their husbands and therefore have less bargaining power;<sup>182</sup> they lose because their husbands do not believe in egalitarian gender roles;<sup>183</sup> they lose because the marriage they have, even with minimal amounts of caretaking help, is better than the life they would have without marriage;<sup>184</sup> and, just as important, they lose because they love their husbands and they do not want to ask them to sacrifice the positive identity that can come from providing. It is all too obvious why women lose these battles, and if we want to change the outcome, we have to change the terms on which the battle is fought. In taking much of the resource allocation decision away from the household (by providing more generous governmental allowances) and in forcing couples to start from a premise that caretaking is an essential part of parenthood,<sup>185</sup> we significantly alter the parties' bargaining

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180. See Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 161 (1992) ("For women as a group, avoiding stress [by not challenging traditional gender roles] can mean accepting the status quo rather than pushing for change even, or especially, when it hurts.").

181. See Mnookin & Kornhauser, *supra* note 12, at 950 (arguing that what the law says affects the expectations and bargaining positions of those who bargain outside the courtroom).

182. See *supra* note 113 and accompanying text.

183. See *supra* text accompanying note 82 (couples with expressed commitment to gender equality more likely to share domestic duties more evenly).

184. John Knowles, *Why Are Married Men Working So Much?* (Penn. Inst. for Econ. Research, Working Paper No. 05-031, 2005) (finding that married men's leisure declined as the attractiveness of single life for married women increased); see also MAHONEY, *supra* note 161, at 43-48 (discussing how the presence of children usually decreases women's ability to bargain within marriages).

185. This would also mean that paternity law as we have known it would disappear. A man would not be considered a father just because he provided. A man could not be held responsible for providing just because he was a biological father. See Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1 (2004) (engaging in a thorough discussion of the incoherent state of current paternity laws).

positions.

The default rule proposed here takes men's resources away from women and the provider role away from men. This will be difficult and stressful for many women and troubling and painful for many men. Women will receive more resources from the state, but many men will lose their exclusive provider status. Both men and women may have to re-formulate their own understandings of their self-worth. This is necessary because contemporary understandings of self-worth are wrapped up in a gender division that disproportionately burdens women and destroys balance. If we want to achieve balance for both men and women, we need to dislodge the caretaking and provider roles from their central places in the definitions of motherhood and fatherhood.

## V. CONCLUSION

I am not naïve enough to think that these sorts of legal changes can happen quickly, but I am concerned enough to believe that we must think creatively about how to balance the unbalanced ways in which men and women currently work and parent. Traditional unbalanced approaches to work and parenting, like those so elegantly modeled in Gary Becker's conceptualization of the household,<sup>186</sup> may have made sense for many parents once, but they do not make much sense today. Most households cannot afford complete specialization. Mothers have to provide as well as caretake. Our allegiance to the specialized household does nothing for these families but maintain the idea that caretaking is (ideally) women's work, thus making it all that much harder for these mothers to ask their husbands to shoulder more of the domestic work. Allegiance to the household deflects our gaze away from the millions of children whose needs cannot be met within the household, and our allegiance to the household cannot be justified as necessary methodologically in light of the data we have. Current household expenditure data tells us remarkably little about what children need. The one group well-served by the household model is elite couples that can afford to and continue to specialize. In the name of helping this group, the current law edifies a norm that glorifies a traditional division of labor. In doing so, it helps keep most people's lives unbalanced.

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186. See discussion *supra* note 10.

